COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-11477

AUTO FLAT CAR CRUSHERS, INC.
Plaintiff-Appellant/Cross-Appellee

v.

HANOVER INSURANCE COMPANY
Defendants-Appellee/Cross-Appellant

ON APPEAL FROM A JUDGMENT
OF THE NORFOLK SUPERIOR COURT

BRIEF OF THE *AMICUS CURIAE* UNITED POLICYHOLDERS

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Table of Contents

	Page
Table of Authorities	ii
Interest of Amicus Curiae	1
Statement of the Issue	4
Statement of the Case	4
Statement of the Facts	5
Summary of the Argument	5
Argument I. An Insurance Company That Commits An Unfair or Deceptive Act And Fails To Tender An Offer Of Settlement Prior To Or At The Time It Files An Answer To A Complaint May Not Avoid The Possibility Of Multiple Damages By Making Payments During Ensuing Litigation.	6
Conclusion	16
Rule 16(k) Certification	17
Certificate of Service	17

Table of Authorities

Cases	Page
Alliance Ins. Co. v. Gill, 426 Mass. 115 (1997)	3
Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London, 449 Mass. 621 (2007)	3
Bag Co. v. Audubon Indem. Co., 999 So.2d 1104, 1116 (La.2008)	13
Boston Gas Co. v. Century Indem. Co., 454 Mass. 337(2009)	3
Clark Equip. Co. v. Massachusetts Insurers Insolvency Fund, 423 Mass. 165 (1996)	3
Drywall Sys., Inc. v. ZVI Const. Co., Inc., 435 Mass. 664 (2002)	11
Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962)	15
Fed. Ins. Co. v. HPSC, Inc., 480 F.3d 26, 35 (1st Cir. 2007)	11
Foley v. Interactive Data Corp., 47 Cal. 3d 654, 684, 765 P.2d 373, 390 (1988)	6

Cases | **Page**

Goodson v. Am. Standard Ins. Co. of Wisconsin,
89 P.3d 409, 414 (Colo. 2004) 13

Hadley v. Baxendale, 9 Exch. 341, 345,
156 Eng. Rep. 145 (1854) 7

Humana, Inc. v. Forsyth,
525 U.S. 299, 314 (1999) 3

International Fid. Ins. Co. v. Wilson,
387 Mass. 841, 857(1983) 11, 14

Jet Line Servs., Inc. v.
Am. Employers Ins. Co.,
404 Mass. 706, 718 (1989) 5, 11

John Hancock Mut. Life Ins. Co. v. Banerji,
447 Mass. 875 (2006) 3

Miller v. Fluharty,
201 W. Va. 685, 694,
500 S.E.2d 310, 319 (1997) 7, 10

Rawlings v. Apodaca, 151 Ariz. 149, 154,
726 P.2d 565, 570 (1986) 9, 13

Rhodes v. AIG Domestic Claims, Inc.,
461 Mass. 486, 505 (2012) 16

Cases	**Page**

S. Worcester Cnty. Reg'l Vocational Sch. Dist. v. Utica Mut. Ins. Co., 2010 WL 3222015 at *11 (D. Mass. Aug. 13, 2010) — 12

United States v. S.-E. Underwriters Ass'n, 322 U.S. 533, 540, (1944) — 6

Statutes	**Page**
15 U.S.C. §1101	8
G. L. c. 93A, §§2 and 11	passim
G.L. c. 176D, §3	11

Treatise	**Page**
Kenneth S. Abraham, INSURANCE LAW AND REGULATION, 531-36 (4th ed. 2005)	7

INTEREST OF THE AMICUS CURIAE

United Policyholders ("UP") is a non-profit 501(c) (3) organization founded in 1991 that is a respected voice and a trusted information resource for insurance consumers in all 50 states. UP promotes fair claim and sales practices and integrity in the insurance marketplace. Donations, foundation grants and volunteer labor support the organization's work. UP does not accept funding from insurance companies.

UP assists and advocates for individual and commercial policyholders with regard to the full spectrum of products from home to auto, long term care and business owner's insurance. UP hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.uphelp.org.

UP's work is divided into three program areas: *Roadmap to Recovery™* (disaster recovery and claim help), *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness), and

Advocacy and Action (advancing pro-consumer laws and public policy).

The public knows UP for its unique expertise and consumer-oriented approach to helping people solve insurance challenges after disasters. People and communities use UP's information and tools to secure prompt and fair insurance claim settlements. UP's Roadmap to Recovery program has proven so useful in resolving disputes that county governments in New Jersey, Colorado and California partner with UP to offer the program to their residents as they struggle to recover from hurricanes, flooding and wildfires.

UP analyzes trends, issues and problems related to claims and the insurance marketplace. Commercial and individual insureds, claim professionals and lawyers share information with UP about coverage and claim disputes every day. UP informs the public and the courts and assist regulators and legislators in effectively overseeing business and personal insurance matters. UP's Executive Director has been appointed for six consecutive years as an official consumer

representative to the National Association of Insurance Commissioners where she works with Massachusetts Insurance Commissioner Joseph G. Murphy.

UP strives to assist courts throughout the United States in resolving insurance disputes by filing "friend of the court" briefs in important matters such as this one. UP's amicus briefs have been cited in published decisions by the U.S. Supreme Court and numerous state and federal appellate courts. See e.g. Humana, Inc. v. Forsyth, 525 U.S. 299, 314 (1999) and other briefs cited at www.uphelp.org/library/amicus). Previously UP appeared as *amicus curiae* in five prior cases before the Supreme Judicial Court[1], and has appeared in the First Circuit Court of Appeals and United States District Court for the District of Massachusetts too.

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[1] Boston Gas Co. v. Century Indem. Co., 454 Mass. 337(2009); Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London, 449 Mass. 621 (2007); John Hancock Mut. Life Ins. Co. v. Banerji, 447 Mass. 875 (2006); W. Alliance Ins. Co. v. Gill, 426 Mass. 115 (1997); Clark Equip. Co. v. Massachusetts Insurers Insolvency Fund, 423 Mass. 165 (1996)

In addition to serving Massachusetts consumers through our advocacy work, UP helps people along the shoreline and the Cape who are struggling with increasing costs and decreasing options related to their property insurance.

STATEMENT OF THE ISSUE

Whether an insurance company may avoid liability for multiple damages under G. L. c. 93A §11, where after the insured files suit, and after the insurance company files its answer to the suit, the insurance company makes a series of unilateral payments to the insured, having never made a tender of settlement either before or simultaneously with its answer.

STATEMENT OF THE CASE

UP is content with the Statement of the Case set-forth in Auto Flat’s opening brief.

STATEMENT OF THE FACTS

UP is content with the Statement of the Case set-forth in Auto Flat's opening brief.

SUMMARY OF THE ARGUMENT

A violation of G. L. c. 93A §11 occurs when a plaintiff suffers some adverse consequence flowing from an unfair or deceptive act, "even if it is not quantifiable in dollars." Jet Line Servs., Inc. v. Am. Employers Ins. Co., 404 Mass. 706, 718 (1989). For this reason a culpable defendant remains liable for multiple damages, if it committed an unfair or deceptive act, and fails to offer a reasonable settlement no later than the time it files its answer.

ARGUMENT

I. An Insurance Company That Commits An Unfair or Deceptive Act And Fails To Tender An Offer Of Settlement Prior To Or At The Time It Files An Answer To A Complaint May Not Avoid The Possibility Of Multiple Damages By Making Payments During Ensuing Litigation.

Insurance occupies a special place in society. "Perhaps no modern commercial enterprise directly affects so many persons in all walks of life....Insurance touches the home, the family, and the occupation or the business of almost every person in the United States. United States v. S.-E. Underwriters Ass'n, 322 U.S. 533, 540 (1944). "A policyholder buys an insurance contract for peace of mind and security," and not with the aspiration of

tangling in litigation. Miller v. Fluharty, 201 W. Va. 685, 694, 500 S.E.2d 310, 319 (1997). The insured does not purchase an insurance contract with the goal of making a profit in mind. Protection against calamity is its purpose. Foley v. Interactive Data Corp., 47 Cal. 3d 654, 684, 765 P.2d 373, 390 (1988).

Nearly all insurance policies are contracts of adhesion. Rarely can a business bargain the terms of coverage. Only the biggest purchasers of insurance can negotiate insurance terms. See generally Kenneth S. Abraham, INSURANCE LAW AND REGULATION, 531-36 (4th ed. 2005). Given this reality, in the latter part of last century, Courts and state legislatures recognized the inadequacy of damages, for insurance contract breaches, provided for under the traditional rule announced in Hadley v. Baxendale, 9 Exch. 341, 345, 156 Eng. Rep. 145 (1854).

The National Association of Insurance Commissioners ("NAIC") developed model legislation for regulating insurance companies and for protecting policyholders. To this day insurance remains highly

regulated because of its enormous importance to not only individual policyholders, and businesses but the public at-large.

The duty to regulate remains with the states. This has always been and remains the norm in the United States. In 1945, when Congress passed the McCarran-Ferguson Insurance Regulation Act, the purpose of which was to leave regulation with the states. "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest...." 15 U.S.C. §1101.

The state courts remain the back-stop to enforce insurance laws and regulations. The dispute before this Court arising under Chapter 93A requires enforcing a specific law aimed at encouraging early settlement of insurance disputes between the insured and the insurance company.

An unspoken foundation of the relationship between the insured and the insurance company, "is the insurer's obligation to play fairly with its

insured." Rawlings v. Apodaca, 151 Ariz. 149, 154, 726 P.2d 565, 570 (1986). The distinction between an insurance contract and every other commercial contract is that an insured purchases insurance: (1) to avoid anxiety in event of disaster; and (2) to hedge against financial ruin. The insured gives-up more than just monetary consideration to achieve its goal; the insured, sometimes, places its very existence within the control of an insurance company, when the need to secure a defense or indemnity arises.

Under a typical insurance contract whether to pay or to litigate remains solely with the insurance company. The Hanover policy provides, "We have the right to settle any claim or lawsuit as we see fit." (RA 265). If calamity happens which the insured knows is a covered risk, the actions or omissions of the insurance company may impact whether the insured continues to stay in business. With this framework, the relationship between the insured and insurer is not fiduciary but recognized as special.

And against the risk of an insurer placing its financial interests ahead of the insured is a reason why Courts and legislatures treat the insured and the insurance company differently than a party to a run-of-the-mill contract. If an insurer may deny payment or delay payment, subjecting itself to traditional contract remedies only, then the two primary grounds why an insured purchases insurance are defeated. The insured bought the contract for peace-of-mind and to avoid financial disaster. Miller v. Fluharty, 201 W. Va. 685, 694, 500 S.E.2d 310, 319 (1997).

The Commonwealth and other states enacted a model Unfair Trade Practices Act in part, to protect the insured in its unequal bargain with the insurance company. G. L. c. 93A serves a number of goals, including indirectly regulating insurance behavior and protecting the insured from unfair practices of an insurer. As a consequence, this Court has read the

statute very broadly. See e.g. Drywall Sys., Inc. v. ZVI Const. Co., Inc., 435 Mass. 664 (2002)(holding that under §11, an arbitrator may award triple damages even though an arbitration award is not a "judgment").

Together G. L. c. 93A and c. 176D impose duties on an insurer to treat policyholders fairly. This includes fostering a prime purpose of G. L. c. 93A §11 -- encouraging reasonable settlement offers early. International Fid. Ins. Co. v. Wilson, 387 Mass. 841, 857(1983).

A violation of G. L. c. 93A §11 occurs when a plaintiff suffers some adverse consequence flowing from an unfair or deceptive act, "even if it is not quantifiable in dollars." Jet Line Servs., Inc. v. Am. Employers Ins. Co., 404 Mass. 706, 718 (1989). Given that this Court has concluded that a violation of the unfair claim settlement practices act, G.L. c. 176D, §3 is evidence of an unfair business practice under chapter G. L. c. 93A, §2, this in turn permits a Court to find a violation under §11. Fed. Ins. Co. v. HPSC, Inc., 480 F.3d 26, 35 (1st Cir. 2007)."An insurer's

actions in offering shifting or inconsistent reasons for not paying a claim may constitute an unfair practice within in the meaning of Chapter 93A." S. Worcester Cnty. Reg'l Vocational Sch. Dist. v. Utica Mut. Ins. Co., 2010 WL 3222015 at *11 (D. Mass. Aug. 13, 2010)

For this reason a culpable defendant remains liable for multiple damages for having committed that unfair or deceptive act, and having failed to tender a reasonable settlement at or before the time it files its answer to a complaint. Merely paying what is already due does not extinguish the unfair or deceptive act or its past consequences, or even the consequences of actions in litigation. Id. at *10. G. L. c. 93A, §11 dictates the time the offer or payment should be made; before or at the same time as filing the answer. The time period is not open ended.

Once the unfair or deceptive act occurs, the defendant has the opportunity up to the time it files its answer to a complaint to make good for its unlawful conduct by offering a reasonable settlement.

This is not unique to G. L. c. 93A. See e.g. Bag Co. v. Audubon Indem. Co., 999 So.2d 1104, 1116 (La.2008)(failing to pay the undisputed amount of a property damage claim within the statutory time of 30 days is "by definition, arbitrary, capricious or without probable cause"); Goodson v. Am. Standard Ins. Co. of Wisconsin, 89 P.3d 409, 414 (Colo. 2004)(payment by the insurer will not relieve the insurer for presuit conduct); Rawlings v. Apodaca, 151 Ariz. 149, 156, 726 P.2d 565, 572 (1986)(an insurance company's election to pay does not absolve it from liability for "bad faith")

Under §11, a defendant, when answering a complaint, "may tender with his answer in any such action a written offer of settlement for single damages." G.L. c. 93A, §11. If the offer is reasonable as determined by the Court, "in relation to the injury actually suffered" by the plaintiff, the Court may not award multiple damages. G.L. c. 93A, §11. After the defendants files its answer, however, and the defendant chooses not to file an offer of

settlement simultaneously or before, the defendant may not escape the possibility of multiple damages by merely tendering payments during the litigation, even if those payments constitute sums due plus interest and attorney's fees and costs. To hold otherwise, would undermine one of the main purposes of G.L. c. 93A – promoting settlement offers promptly. International Fid. Ins. Co. v. Wilson, 387 Mass. at 857.

The Legislature granted insurance companies the chance to cure unfair or deceptive acts before or when answering a complaint, but not during ensuing litigation. If an insurer commits an unfair or deceptive act, it may limit ensuing damages prior to filing an answer or at the same time, but not later.

The opportunity to cure is time sensitive. The legislature crafted the timing of the offer. The legislature could have selected a different deadline. Given that the legislature made a specific choice, the Court should implement the date picked by the legislature.

Perhaps if the insurance company stipulates to liability and admits that it committed an unfair or deceptive act, and proceeds to a trial on damages only, the Court may view that admission as a mitigating circumstance affecting the multiplier. But as a matter of law, the insurance company cannot unring the bell of unfair or deceptive conduct by tendering payment later than the time it files its answer. See Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962)(Noting that curative jury instructions "cannot unring the bell" in every instance, as aberrant behavior may irrevocably impact the substantive rights of a criminal defendant).

To permit the insurer to make payment at any time, even if the payment is enhanced with interest plus attorney's fees, defeats a prime goal of G.L. c. 93A, §11 – reasonable, prompt and early settlements. As this Court recently held punitive damages leveled against an insurer are not within the same sphere of

compensatory damages. Rhodes v. AIG Domestic Claims, Inc., 461 Mass. 486, 505 (2012). The claim under §11 stands apart from the breach of contract claim.

If the insurer can escape the regulatory purpose and compensatory scheme by paying interest and attorney's fees at any time, and avoid multiple damages, a prime goal of G.L. c. 93A §11 is gutted. When to pay would become merely a business decision for the insurance company. The protections that the statue provides would be rendered a nullity.

CONCLUSION

United Policyholders joins in the request to vacate the judgment of the Superior Court, for entry of judgment for Auto Flat as to Counts II - IV, and for further relief remanding this matter for trial on Count V with instructions that amounts paid by Hanover offset the finding for Auto Flat, if any.

Respectfully submitted
UNITED POLICYHOLDERS

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CERTIFICATE OF COMPLIANCE WITH RULE 16(k) OF MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I hereby certify that this brief complies with the rules of this Court, including Rules 16, 18 and 20 of the Massachusetts Rules of Appellate Procedure.

*/s/ Jonathan M. Feigenba*um
____
Jonathan M. Feigenbaum

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing brief and on this day via first class mail, postage pre-paid, on all counsel of record.

Date: April 28, 2014
*/s/ Jonathan M. Feigenba*um
____
Jonathan M. Feigenbaum